

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THOMAS A. WEBER,

Plaintiff,

v.

TIME WARNER, INC., *et al.*,

Defendants.

Case No. C05-1706L

ORDER GRANTING IN PART AND  
DENYING IN PART THIRD  
MOTION TO AMEND COMPLAINT

**I. INTRODUCTION**

This matter comes before the Court on plaintiff's third motion to amend his complaint. (Dkt. #131). Plaintiff seeks to add a new defendant, Warner Music SP, Inc. ("WMSP") and to add a new claim against defendant David Cross.

For the reasons set forth below, the Court grants the motion in part and denies it in part.

**II. DISCUSSION**

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Court considers four factors in deciding whether to grant leave to amend: "bad faith, undue delay, prejudice to the opposing party, and the futility of amendment." Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). A proposed amendment is futile if it could be defeated by a motion to dismiss or if plaintiff cannot prevail on the merits. See, e.g., Smith v. Commanding Officer,

1 555 F.2d 234, 235 (9th Cir. 1977).

2 Plaintiff contends that he recently learned that proposed new defendant WMSP is an  
3 “indispensable party” and the owner of Sub Pop Records. Plaintiff notes that if he is permitted  
4 to join WMSP, he “would drop Defendant Sub Pop Ltd. as a party.” Plaintiff’s Motion at p. 1.  
5 Defendants have not objected to those proposed amendments. Accordingly, plaintiff’s request to  
6 amend to add WMSP and voluntarily dismiss Sub Pop Ltd. is granted.

7 Plaintiff also seeks to add a claim against Cross pursuant to the Tennessee wiretapping  
8 statute. The statute provides a civil remedy for “any aggrieved person whose wire, oral or  
9 electronic communication is intentionally intercepted, disclosed, or used in violation of § 39-13-  
10 601 or title 40, chapter 6, part 3 . . .” Tenn. Code Ann. § 39-13-603. Defendants object to  
11 plaintiff’s request to add the new claim based on undue delay, prejudice to defendants, and  
12 futility of the amendment. Specifically, defendants contend that plaintiff’s delay has been undue  
13 for three reasons: (1) plaintiff has had two prior opportunities to amend his complaint, but failed  
14 to add this claim; (2) it appears that plaintiff seeks to add the new claim to defeat defendants’  
15 pending dispositive motion which was noted for the same day as this motion, and (3) the only  
16 reason plaintiff offers for failing to assert the claim earlier is that he mistakenly believed the  
17 claim “was barred by Tennessee’s general one (1) year [statute] of limitation.” Plaintiff’s  
18 Motion at p. 1. Defendants also contend, and the Court finds, that the belated amendment would  
19 be prejudicial to them as they have responded to substantive motions and have a motion for  
20 summary judgment pending. Allowing plaintiff to add a new claim would delay consideration  
21 of that motion.

22 Defendants also argue that the proposed wiretapping claim is futile<sup>1</sup> because the statute  
23 does not cover the type of communication at issue here, where one party has consented to the  
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25 <sup>1</sup> Defendants also argue that the Tennessee wiretapping claim is time barred with respect  
26 to any proposed new defendants. Although that argument has merit, plaintiff only asserts the  
27 claim against defendant Cross.

1 “interception.” Defendants note that plaintiff has “failed to show any evidence of an objective  
2 expectation of privacy or to allege any private communication to which David Cross was not  
3 present or a party.” Defendants’ Response at p. 9; see also Tennessee v. Munn, 56 S.W.3d 486,  
4 497 (2001) (quoting Tenn. Code Ann. § 40-6-302(b), which applies when “no party to the  
5 communication has consented to the interception;” noting that the statute defines “oral  
6 communication” as “uttered by a person exhibiting an expectation that such communication is  
7 not subject to interception under circumstances justifying that expectation”). Defendants’  
8 argument has merit. Furthermore, plaintiff did not file a reply in support of his motion, so he has  
9 not contested or rebutted defendants’ argument. Nor has he identified any communication to  
10 which the Tennessee wiretapping statute would apply.<sup>2</sup> Because the addition of the wiretapping  
11 claim would result in some prejudice to defendants and would be futile, the Court denies the  
12 request to add that claim.

13 Plaintiff also requests that the Court impose sanctions on defendants based on their  
14 “willful failure to disclose to Plaintiff that [WMSP] was a real indispensable party of interest  
15 that owns Sub Pop Records until February 20, 2006” even though plaintiff had “demanded” the  
16 information during the parties’ Rule 26(f) conference. Plaintiff’s Motion at p. 3. Plaintiff has  
17 not shown that defendants were obligated to identify the proper defendants for him or that they  
18 violated their obligations under the discovery rules. Accordingly, plaintiff’s request for  
19 sanctions is denied.

### 20 **III. CONCLUSION**

21 Accordingly, plaintiff’s motion to amend is GRANTED IN PART AND DENIED IN  
22 PART. Plaintiff may file an amended complaint that is consistent with this order within twenty  
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24 <sup>2</sup> The allegation in the complaint is vague and does not specifically identify any  
25 communications subject to the wiretapping statute. Proposed Second Amended Complaint (Dkt.  
26 #131-2) at ¶ 19 (alleging claim against Cross for “intentionally intercepting an oral  
27 communications [sic] of Plaintiff with a video recording device and then disclosing and  
28 disseminating its contents on a CD/DVD”).

1 days of the date of this order. The amended complaint shall not add new allegations or parties  
2 beyond those included in plaintiff's second proposed amended complaint and authorized by this  
3 order.

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5 DATED this 15th day of March, 2006.

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9 Robert S. Lasnik  
10 United States District Judge  
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